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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 283

UNION TANK CAR COMPANY, a New Jersey corporation,
Petitioner,

v.

DRAGOR SHIPPING CORPORATION, a Delaware corporation, formerly WARD INDUSTRIES CORPORATION,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF RESPONDENT DRAGOR SHIPPING CORPORATION IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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BRIEF OF RESPONDENT DRAGOR SHIPPING CORPORATION IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The respondent, Dragor Shipping Corporation ("Dragor"), formerly Ward Industries Corporation, respectfully prays, for the reasons and upon the authorities hereinafter set forth, that this Petition for a Writ of Certiorari be denied.

The Judgment of the Court of Appeals Sought To Be Reviewed

The petitioner, Union Tank Car Company ("Union"), is a New Jersey corporation, with its principal place of business in the State of Illinois. The respondent Dragor is a Delaware corporation, with its principal place of business in the State of New York. Union sought to institute the within action against Dragor in the United States District Court of Arizona upon causes of action arising in the State of New York based upon Dragor's alleged default under an agreement of settlement and non-negotiable promissory note, both of which were executed, delivered and allegedly breached in the State of New York.

At the time that Union's causes of action allegedly arose in the State of New York, and for many months, indeed years, prior thereto, Dragor was not engaged in the transaction of any business in the State of Arizona. Nor was it qualified to do business therein. It had formally withdrawn from the State of Arizona under a certificate duly issued by the Arizona Corporation Commission approximately five months before the causes of action allegedly arose and approximately eight months before service of process was allegedly effected upon the Arizona Corporation Commission and the C. T. Corporation, Dragor's statutory agent in the State of Arizona before its withdrawal from that State.

In the Courts below, service of process was sought to be sustained by the petitioner under an Arizona statute which provided that an action might be commenced against a foreign corporation after it had withdrawn from the State of Arizona in accordance with its laws by the service of process upon the Arizona Corporation

Commission, provided that the cause of action arose in the State of Arizona "from business done or transactions arising" in that State.

Upon motion seasonably made, the Arizona District Court refused, without opinion, to vacate and quash the service of process under said statute. Upon appeal, the Court of Appeals for the Ninth Circuit ruled, in a learned and comprehensive opinion, that the causes of action set forth in the petitioner's complaint "pertain only to the settlement agreement and note executed and delivered in New York" and that the petitioner's suit was "exclusively predicated upon claims arising in New York" (Opinion, p. 23).*

The Court of Appeals thereupon reversed the District Court and vacated the service of process. It declared:

> "The result which we reach here places no hardship upon Union, but protects Dragor from the hardship of being hauled across the country to defend itself in a suit exclusively predicated upon claims arising in New York. Union is a New Jersey corporation and has its principal place of business in Illinois. Nothing in this record suggests how it will be prejudiced by suing Dragor in Delaware, where it was incorporated, or New York, where it has its principal place of business and where this cause of action arose. Arizona has no interest in providing Union with a forum for such an action" (Opinion, p. 23).

Statement of Facts

The argumentative assertions contained in Union's petition are so factually erroneous and misleading that

* The opinion of the Court of Appeals, not as yet reported, is printed as Appendix A to the petition, pp. 15-23. All page references herein to the opinion refer to the pages of the petition, Appendix A.

an accurate statement of the facts is essential to a comprehension of the issues involved herein. Those facts, established under oath by Dragor's President, were submitted to the District Court upon Dragor's special appearance "for the sole and only purpose of contesting the propriety and validity of the purported service of process upon it in this case, and the jurisdiction of this Court over its person * * *" (R., p. 15). Those facts, never controverted, challenged or denied, are as follows:

1. The Execution, Issuance and Delivery of the Settlement Agreement, Promissory Note, Assignment of Claims, Covenant Not To Sue and Other Settlement Documents by and between Union and Dragor in the State of New York on October 3, 1963

Prior to October 3, 1963, Union and Dragor were involved in several extensive suits and cross-suits in the States of Illinois, Arizona and California (R., pp. 21-22). In addition, actions had been instituted by third parties against Union and/or Dragor in various courts, including the State of New York (R., pp. 21-22). Finally, Dragor had asserted certain claims against Union, The Fluor Corporation, Ltd. ("Fluor"), a California Company, and the United States government for contract adjustment arising from and out of a subcontract which had theretofore been executed by and between Union and a joint venture of Dragor and Idaho Maryland Industries, Inc., a California company, covering a portion of the construction of missile launch facilities near Tucson, Arizona (R., p. 22). Such claims would have required hearings before the Board of Contract Appeals in Washington, D. C. and ultimately before the Federal Court of Claims (R., p. 22).

On October 3, 1963, all of these litigations, claims, cross-claims and demands were fully, finally and completely settled and compromised in the State of New York by a settlement agreement between Union and Dragor which was embodied in two documents, one encaptioned "Agreement of Settlement" (R., pp. 5-9), and the second encaptioned "Covenant Not To Sue" (R., pp. 22, 5-9, 26-27). These two documents collectively constituted the settlement agreement between the parties (R., p. 22). Each of these documents was simultaneously executed and delivered in the State of New York. By its terms, the agreement of settlement required Dragor's execution and delivery to Union of a non-negotiable promissory note in the sum of $1,000,000 payable upon certain designated conditions on September 30, 1964 (R., p. 7). Such a note was simultaneously executed and delivered by Dragor to Union in the State of New York (R., pp. 10-11, 22). The agreement of settlement also required the execution of an Assignment to the petitioner's counsel of Dragor's claims against Fluor and the United States government which Union undertook to prosecute promptly and vigorously, crediting Dragor with stipulated percentages of its recovery (R., pp. 7-8, 109). It required, in addition, the execution of stipulations discontinuing with prejudice the pending lawsuits in Arizona and California (R., pp. 8-9). All of these documents were simultaneously executed in the State of New York on October 3, 1963 (R., p. 22).

Upon the issuance, execution and delivery of these settlement documents in the State of New York on October 3, 1963, every right, claim, obligation, demand, liability or cause of action which had previously existed or had previously been asserted by either of the parties against the other, "regardless of the nature or description

thereof and whether or not now known", *were forever released, discharged, extinguished and at an end* (R., pp. 6, 22). From and after October 3, 1963, the *only* duties which Union owed to Dragor and the *only* duties which Dragor owed to Union were those reciprocal duties and obligations which had been carefully formulated by counsel for the parties and explicitly set forth in the Agreement of Settlement, Assignment of Claims, Covenant Not To Sue and Promissory Note, each of which was issued, executed and delivered in the State of New York (R., p. 22). By their terms, these documents created an absolute and immediate obligation on the part of Union to prosecute Dragor's claims against Fluor and the United States, for the benefit of Dragor, and a contingent obligation on the part of Dragor in New York which was not to become due and owing, under any circumstances, until September 30, 1964 (R., pp. 10-11).

2. On September 30, 1964, When the Plaintiff's Cause of Action Allegedly Arose Upon the New York Settlement Agreement and Promissory Note, Dragor Was Neither Engaged in the Transaction of Business Nor Licensed to Do Business in the State of Arizona

It indisputably appears from the record herein that Dragor was not licensed to do business in the State of Arizona on September 30, 1964, and was not in fact transacting any business whatsoever in that State on that day or for many months prior thereto, or at any time thereafter (R., p. 20).

As appears from the formal certificate of the Arizona Corporation Commission (R., p. 25), Dragor had formally withdrawn from the State of Arizona on April 30, 1964, approximately five months before the plaintiff's cause of

action accrued (R., pp. 20, 25). In the language of that certificate, on that day, Dragor *"ceased to exist,* except as to creditors." Simultaneously, the authority of its statutory agent to receive service on its behalf was duly terminated (R., p. 20).

Consequently, it is incontrovertible that Dragor was not engaged in the transaction of any business or qualified to transact any business in the State of Arizona, either on September 30, 1964, when Union's alleged causes of action arose upon instruments executed, delivered and effective in the State of New York, in a transaction consummated in the State of New York, or on December 23, 1964, when service of process was effected upon the Arizona Corporation Commission (R., p. 20).

3. The Petitioner's Complaint

The petitioner's complaint contains two counts (R., pp. 2-11).

In its first count, the petitioner alleges that, on October 3, 1963, Dragor and Union executed an "Agreement of Settlement" (R., pp. 2, 5-9), which provided, in part, that the respondent would pay to the petitioner, "on or before September 30, 1964 the sum of One Million ($1,000,000) Dollars * * * which sum shall be evidenced by a non-negotiable promissory note" of Dragor payable to the order of Union (R., p. 7). It is further alleged that the defendant failed to pay the sum of $1,000,000 "when it became due as provided in said Agreement of Settlement" and that such sum is due and owing from the respondent (R., p. 3).

In its second count, the petitioner alleges that, on October 3, 1963, the respondent "made, executed and delivered a promissory note" payable on September 30, 1964; that

payment of said promissory note is past due and delinquent; and that the petitioner is entitled to the recovery of said amount (R., p. 4).

The petitioner's complaint does *not* allege that the agreement of settlement or promissory note were negotiated, issued, executed, delivered or breached in the State of Arizona (R., p. 20). It does *not* allege that the petitioner's causes of action arose or accrued in the State of Arizona. It does *not* allege that, when the alleged cause of action arose, Dragor was qualified to do business or was, in fact, transacting any business in the State of Arizona (R., p. 20).

The causes of action set forth in the petitioner's complaint are, upon their face, based upon the petitioner's affirmance of the New York settlement agreement of October 3, 1963, the New York promissory note executed and delivered by Dragor thereunder, and the New York general releases executed simultaneously therewith (R., p. 23). By its action, Union was seeking to enforce in the State of Arizona a duty created solely and only by documents executed, delivered and effective in the State of New York and not a duty created by any other transaction or circumstance occurring at any other time or place (R., p. 23).

Similarly, Dragor was affirming the New York settlement agreement, claiming the financial benefits of which it had been deprived by Union's breach of the specific obligations which it had undertaken under the assignment of claims which it had procured as a part of the settlement (R., pp. 23, 98-103). The Court of Appeals noted that both Union and Dragor were seeking to enforce the settlement agreement; neither challenged its validity (Opinion, p. 22).

4. Service of Process

Service of process was purportedly effected by the service of the summons and complaint upon the C. T. Corporation, its former statutory agent, and the Arizona Corporation Commission on the 24th day of December, 1964 (R., pp. 13-14), allegedly under the provisions of §10-481(a)(2) of the Arizona Revised Statutes. That section provides in part that a foreign corporation, before transacting any business in Arizona, shall:

> "Appoint in writing * * * a statutory agent in each county in this state in which the corporation will carry on business, and file with the Corporation Commission, in the form prescribed by the Commission, an irrevocable consent to service of pleadings or process *which shall become effective upon the revocation, annulment or voluntary withdrawal of the license to do business in this state,* and which shall provide that actions arising out of or involving business done or transactions arising in this state may be commenced against the corporation in any court of competent jurisdiction within this state, by the service of pleadings or process upon the Commission." (Italics ours.)

The purpose of such statutes, and the extent of the powers created thereby, have been repeatedly formulated by this Court. In *Morris & Co.* v. *Skandinavia Insurance Co.,* 279 U. S. 405, 49 Sup. Ct. 360, this Court declared at page 361:

> "The purpose of state statutes requiring the appointment by foreign corporations of agents upon whom process may be served is primarily to subject them to the jurisdiction of local courts in controversies *growing out of transactions within*

> *the state* (Citing cases). The language of the appointment and of the statute under which it was made plainly implies that the scope of the agency is intended to be so limited. * * *" (Italics ours.)

Earlier, in *Simon* v. *Southern Ry. Co.*, 236 U. S. 115, 130, 35 Sup. Ct. 255, 260, this Court had stated:

> "But this power to designate by statute the officer upon whom service in suits against foreign corporations may be made *relates to business and transactions within the jurisdiction of the state enacting the law.* Otherwise, claims on contracts, wherever made, and suits for torts, wherever committed, might, by virtue of such compulsory statute, be drawn to the jurisdiction of any state in which the foreign corporation might at any time be carrying on business. The manifest inconvenience and hardship arising from such extra-territorial extension of jurisdiction by virtue of the power to make such compulsory appointments could not defeat the power if in law it could be rightfully exerted. But these possible inconveniences serve to emphasize the importance of the principle laid down in Old Wayne Mut. Life Asso. *v.* McDonough, 204 U. S. 22, 51 L. Ed. 351, 27 Sup. Ct. Rep. 236, that the statutory consent of a foreign corporation to be sued *does not extend to causes of action arising in other states.*" (Italics ours.)

The Grounds Advanced by the Petitioner in its Petition to Justify the Issuance of a Writ of Certiorari by this Court are Erroneous in Fact and Contrary to the Repeated Decisions of this Court

Upon this petition for a writ of certiorari, the petitioner has virtually abandoned every factual and legal argument which it urged in the Courts below to sustain the service of process herein.

In their place, for the very first time, it presents a brand new argument predicated upon a totally erroneous statement of facts. It now contends that the agency of the C. T. Corporation, Dragor's statutory agent in Arizona prior to its formal withdrawal from that state, had never been revoked by Dragor "nor is any revocation asserted by Dragor" (Petition, pp. 10-11). Upon that supposition, it argues that even though Dragor withdrew from the State of Arizona on April 30, 1964, eight months before the purported service of process, its alleged failure to terminate the statutory agency of the C. T. Corporation "constituted an actual consent by that corporation to be found within the state and therefore subject to the jurisdiction of local courts through service of process on the statutory agency" (Petition, p. 9). Such an "actual consent," it is claimed, extended to every cause of action against the foreign corporation, wherever and whenever it arose.

The foregoing arguments are totally unfounded in fact and untenable in law. We turn to an examination of the record and the applicable decisions of this Court, both of which are contravened by the petitioner's newly conceived contentions.

ARGUMENT

POINT I

The Court of Appeals properly ruled that Dragor, a foreign corporation, neither doing business nor qualified to do business in the State of Arizona, could not be subjected to the *in personam* jurisdiction of the Arizona District Court in a suit by the petitioner which was "exclusively predicated upon claims arising in New York" (Opinion, p. 23).

Upon the record herein, the Court of Appeals held that the claims asserted by Union in this action "pertain *only* to the settlement agreement and note executed and delivered in New York"; that "the *only* issues presented related to its breach and not to its validity"; and that Union's suit herein is "predicated *exclusively* upon claims arising in New York * * * where this cause of action arose" (Opinion, pp. 22-23). The factual and legal bases for the determination of the Court of Appeals are incontestable.

Under universally established law, applied by the Court of Appeals to the uncontradicted facts herein, a settlement and compromise constitutes "a new and superior contract superseding and extinguishing the contract or contracts upon which the original action between the parties was based, and the action itself. It relates to matters of differences and controversies other than, as well as, those involved in the original action. It concerns all the claims and grievances of the plaintiff against the defendant and of the defendant against the plaintiff. Each party enters into new agreements and assumes new obligations" (*Moers* v. *Moers,* 229 N. Y. 294 at 300).

A comprehensive description of the legal import of the settlement agreement under the laws of the State of New York—the locus of the instruments—was formulated by the New York Court of Appeals in *Yonkers Fur Dressing Co.* v. *Royal Insurance Co.*, 247 N. Y. 435, in the following language at pages 444, 446:

> "The settlement of the original controversies involved in these actions resulted in a new agreement to the effect 'that the above entitled litigation is settled and terminated, * * * the insurance companies in interest having agreed to pay the sum of $92,500 in full settlement of all claims.' It is the settlement and termination of the litigations, marking a fresh start by the plaintiff from a new coign of vantage. The compromise was wholly foreign and extrinsic to the litigation and to any action by the court. * * * *When the cases were marked 'settled and discontinued' in open court by the parties, it was as if they had never been begun.*
>
> A contract of settlement, if valid in itself, is final and is to be sustained by the court without regard to the validity of the original claim. (Smith *v.* Glens Falls Ins. Co., 62 N. Y. 85; Sears *v.* Grand Lodge A.O.U.W., 163 N. Y. 374.)
>
> * * * The agreement of settlement was, under these circumstances, entered into by defendants, not lightly, inadvertently, inadvisedly or improvidently, but in order to make the best terms possible with the plaintiff. The hope of gaining was balanced against the risk of losing. There was an exchange of equivalents, irrevocable except for fraud, a settlement of a controversy presumably honest. *The old causes of action were terminated. A new liability was substituted therefor. The nature of the new cause of action we need not define. Enough to say that it superseded the old.*" (Italics ours.)

The foregoing rules of law have been universally applied. In *Wilson* v. *Bogert,* 81 Idaho 535, 542, 347 P. (2d) 341, 345, the Supreme Court of Idaho formulated the applicable principles as follows:

> "An agreement of compromise and settlement is a merger and bar of all pre-existing claims which the parties intended to settle thereby. Moran *v.* Copeman, supra; Shriver *v.* Kuchel, 113 Cal. App. 2d 421, 248 P. 2d 35; 15 C.J.S. Compromise and Settlement §24, p. 739. *Such prior claims are thereby superseded and extinguished.* The compromise agreement becomes *the sole source and measure of the rights of the parties* involved in the previously existing controversy. The existence of a valid agreement of compromise and settlement is a complete defense to an action based upon the original claim." (Italics ours.)

The Arizona rule is precisely the same (*Pacheco* v. *Delgardo,* 46 Ariz. 401, 52 P. (2d) 479, 480; *Cano* v. *Arizona Frozen Products Co.,* 38 Ariz. 404, 408, 300 Pac. 953).

If, as the state courts throughout the land, including New York and Arizona, have universally held, an agreement of settlement completely extinguishes an existing claim and disposes of previously instituted actions "as if they had never been begun" (*Yonkers Fur Dressing Co.* v. *Royal Insurance Co., supra,* at p. 444), and if, by virtue of the agreement of compromise and settlement, "a new liability was substituted" for any claims previously existing, the new having "superseded the old", then it is plain that the situs of the actions thereby superseded, extinguished and at an end "as if they *had never been begun*", cannot possibly constitute a constitutional basis for the assumption of jurisdiction over a non-resident foreign corporation upon the superseding obligation by any non-

domiciliary state other than the state where that new obligation was created.

In accordance with these indisputable principles, the Court of Appeals properly ruled that the petitioner's claims in this action "pertain only to the settlement agreement and note executed and delivered in New York"; and that Union's suit herein is "predicated exclusively upon claims arising in New York * * * where this cause of action arose" (Opinion, p. 23).

Directly applicable, therefore, was this Court's decision in *Hanson* v. *Denckla,* 357 U. S. 235, where it vacated a Florida judgment against a Delaware corporate trustee based upon substituted service under a Florida statute: "The cause of action in this case is not one that arises out of an act done or transaction consummated in the forum state. In that respect it differs from *McGee* v. *International Life Insurance Company,* 355 U. S. 220 and the cases there cited" (p. 251).

This Court thereupon concluded in *Hanson,* in language completely dispositive of the issues herein (p. 251):

> "In response to these changes, the requirements for personal jurisdiction over nonresidents have evolved from the rigid rule of Pennoyer *v.* Neff, 95 U. S. 714, to the flexible standard of International Shoe Co. *v.* Washington, 326 U. S. 310. But it is a mistake to assume that this trend heralds the eventual demise of all restrictions on the personal jurisdiction of state courts. See Vanderbilt *v.* Vanderbilt, 354 U. S. 416, 418. Those restrictions are more than a guarantee of immunity from inconvenient or distant litigation. *They are a consequence of territorial limitations on the power of the respective States.*" (Italics ours.)

POINT II

The petitioner's newly advanced argument that Dragor's supposed failure to revoke the statutory agency of the C. T. Corporation when it withdrew from the State of Arizona constituted "an actual consent" to its continued presence therein, thereby subjecting it to the jurisdiction of the Arizona courts upon any and every cause of action, wherever and whenever it arose, is erroneous in fact and contrary to the prior decisions of this Court.

A.

THE PETITIONER'S ARGUMENT IS UNFOUNDED IN FACT.

With respect to Dragor's termination of the statutory agency of the C. T. Corporation and Dragor's continuous assertion thereof in the Courts below, the record conclusively establishes:

1. Upon the respondent's motion before the District Court to quash, vacate and annul the service of process and dismiss the summons and complaint, the respondent's president swore—and his testimony was never contradicted or challenged (R., p. 20):

> "As appears from the formal certificate of the Arizona Corporation Commission, a copy of which is hereunto annexed as Exhibit '1', Ward formally withdrew from the State of Arizona on April 30, 1964. *Simultaneously, the authority of its statutory agent to accept service on its behalf was duly terminated.*"

2. In its opening brief to the Court of Appeals (pp. 2-3), the respondent stated in its "Statement of the Case" that

> "the appellant Dragor had formally withdrawn from the State of Arizona and *terminated the authority of its statutory agent to accept service on its behalf on April 30, 1964.*"

3. In its statement of facts, it recited the following (Opening Brief, p. 9):

> "Dragor had formally withdrawn from the State of Arizona on *April 30, 1964* approximately five months before the plaintiff's cause of action accrued (Record, pp. 20, 25). *Simultaneously the authority of this statutory agent to accept service on its behalf was duly terminated* (Record, p. 20)."

4. In its summary of the facts which it deemed incontrovertibly established by the Record, the respondent stated (Opening Brief, p. 10):

> "On April 30, 1964, Dragor formally withdrew from the State of Arizona and *terminated the authority of its statutory agent in Arizona to accept service on its behalf.*"

5. In its Specification of Errors, at page 13 of its opening brief, the respondent urged that

> "the District Court erred in holding that on April 30, 1964, when the appellant formally withdrew from the State of Arizona and *terminated the authority of its statutory agent in that state,* the appellee was an Arizona creditor of the appellant upon an obligation created in Arizona."

6. In its Argument, the respondent urged in Point I(B) (p. 19) that

> "having formally withdrawn from the State of Arizona on April 30, 1964, *and terminated the authority of its Arizona agent on that day,* Dragor could not, eight months thereafter, be subject to the jurisdiction of the Arizona District Court upon a cause of action arising in the State of New York under settlement documents executed and delivered in that state."

It is plain, therefore, that the petitioner's present claim that the agency of the C. T. Corporation was never "revoked" by Dragor nor was "any revocation asserted by Dragor" in the Courts below (Petition, pp. 10-11) is simply untrue.

B.

THE PETITIONER'S ARGUMENT IS UNTENABLE IN LAW.

The petitioner's legal argument, predicated upon its erroneous factual hypothesis, is equally specious. Assuming, *arguendo,* and solely for the purpose of this discussion, that the statutory agency of the C. T. Corporation was not specifically revoked upon the respondent's withdrawal from the State of Arizona, the revocation of the statutory agency would nevertheless have become immediately effective.

Under the Arizona Revised Statutes, §10-481(a)(2), upon "the revocation, annulment or voluntary withdrawal of the license of the corporation to do business in this state", the irrevocable consent to the service of pleadings or process previously executed by the respondent became automatically operative. By its terms, that irrevocable consent provided that "actions arising out of or involving business done or transactions arising in this state may be

commenced against the corporation in any court of competent jurisdiction within this state, by the service of pleadings or process upon the commission." Consequently, any statutory agent appointed prior to the withdrawal would automatically be supplanted upon its withdrawal by the Arizona Corporation Commission upon whom service of pleadings or process could be effected, expressly limited, however, to causes of action arising in the State of Arizona (Opinion, p. 23).

Neither the failure to revoke the statutory agency nor the substitution therefor by a state agency under a state statute would warrant any jurisdiction *in personam* over the withdrawn foreign corporation by the courts of that state upon causes of action arising outside the state. The foregoing proposition of law has been settled by this Court for decades.

The precise issue presented by the petitioner herein to support its request that this Court grant certiorari was considered and rejected by this Court more than 40 years ago in *Chipman Ltd.* v. *Thomas B. Jeffrey Co.*, 251 U. S. 373, 40 Sup. Ct. 172. In that case, the plaintiff commenced an action in the Supreme Court of the State of New York which was removed to the United States District Court for the Southern District of New York. In the latter Court, the defendant moved to vacate the service of process and dismiss the complaint for lack of jurisdiction over the person of the defendant. The plaintiff was a New York corporation. The defendant was a Wisconsin corporation. The plaintiff's action was based upon the defendant's alleged breach of a contract made in Wisconsin.

Prior to the commencement of the action, the defendant had been duly qualified to do business in the State of New York and had designated as its statutory agent upon whom process may be served one, Philip B. Adams, of 21 Park Row, New York, New York. Thereafter, the

defendant removed from the State of New York under its laws. It failed, however, to revoke the designation of Adams as its statutory agent for the service of process. The summons was served upon Adams subsequent to the withdrawal.

It was argued in that case, precisely as in this, that the unrevoked designation of Adams as an agent of the defendant continued the defendant's presence in the State of New York and vested the District Court with jurisdiction *in personam*. In affirming the decision of the Courts below, setting aside the service of the summons and dismissing the complaint for lack of jurisdiction over the person; this Court formulated the plaintiff's arguments in that case in language almost identical with the plaintiff's arguments in this case, at page 378:

> "whether * * * the unrevoked designation of Adams as an agent of defendant gave the latter constructive presence in the state, * * *"

In holding that the District Court did not acquire jurisdiction over the person of the corporate defendant, this Court ruled that the unrevoked designation of a statutory agent after the defendant had withdrawn from the State of New York did not subject the foreign corporation to the *in personam* jurisdiction of the forum state upon a cause of action arising in Wisconsin.

The rationale of the foregoing decision was reaffirmed in *Robert Mitchell Furniture Co.* v. *Selden Breck Construction Co.*, 257 U. S. 213, 42 Sup. Ct. 84. In that case, the plaintiff, an Ohio corporation, brought an action in the Federal Courts of Ohio against the defendant, a Missouri corporation, upon an Illinois contract to be performed in Michigan. The defendant had designated one, Simeon Nash, as an agent for the service of process in

Ohio. Thereafter, it withdrew from that state and performed no business therein. Service of process was effected upon Nash. In holding that "the service upon Nash was bad", this Court ruled that, having withdrawn from the State of Ohio, "the agency of Nash did not extend to receiving service in a suit upon a contract made and to be performed as this was (*Chipman Ltd.* v. *Thomas B. Jeffrey Co.*, 251 U. S. 373, 40 Sup. Ct. 172)."

In *Morris & Co.* v. *Skandinavia Insurance Co.*, 279 U. S. 405, 49 Sup. Ct. 360, an action brought in a State Court of Mississippi was removed to the United States District Court. The plaintiff was a Louisiana corporation and the defendant a Danish corporation engaged in the insurance business. The action was brought against the defendant upon a policy of insurance issued by the defendant in Argentina. Prior thereto, the defendant had appointed both a resident agent and the Mississippi Insurance Commissioner as its agent upon whom process could be served. In dismissing the summons upon the ground that the District Court acquired no jurisdiction *in personam* over the defendant, notwithstanding the service upon the state Insurance Commissioner under the defendant's unrevoked designation, upon causes of action not arising in Mississippi, this Court reaffirmed its prior decisions and emphasized the fact that:

> "The policy sued on was issued and the loss occurred in South America. The importation of such controversies would not serve any interest of Mississippi."

A recent decision by the Court of Appeals for the Seventh Circuit, *Munch* v. *United Air Lines, Inc.*, 184 Fed. (2d) 630 (1950), is precisely in point. In that case, an action was brought in the District Court of Illinois

against the Douglas Aircraft Company upon a cause of action based upon the crash of a plane in Utah. Douglas had originally been authorized to do business in the State of Illinois. At that time, it designated the C. T. Corporation System as its registered agent for the service of process. Although Douglas never withdrew in the manner prescribed by Illinois statutes, its certificate had been revoked by the Illinois Secretary of State several months prior to the service of the summons because of Douglas' failure to pay franchise taxes. However, notwithstanding that revocation, Douglas never terminated the authority of the C. T. Corporation as its registered agent in Illinois for the service of process. The Court of Appeals for the Seventh Circuit phrased the issue before it as follows (p. 632):

> "With respect to the order quashing the service of summons on Douglas Aircraft, plaintiffs contend that, since Douglas had not withdrawn from Illinois in the manner prescribed by Section 120 of the Business Corporation Act *and had never revoked the authority of its registered agent* in accordance with the provisions of that section, *Douglas was subject to process by service on its registered agent* and that the lower court erred in deciding otherwise. Douglas, on the other hand, maintains that, though it had not complied with the Illinois statute, it had, in fact, withdrawn from Illinois and consequently, could not be served there." (Italics ours.)

In sustaining the decision of the District Court which quashed the service of process and dismissed the complaint under an Illinois statute virtually identical with the Arizona statute involved herein, the Court of Appeals squarely ruled that the failure of Douglas to revoke the statutory agency of the C. T. Corporation System could

not vest the Illinois District Court with jurisdiction *in personam* over Douglas upon an action arising in Utah. The Court declared:

> "It seems clear then, that in the case of any foreign corporation whose authority to transact business in Illinois has been terminated, irrespective of whether the termination was effected by issuance of a certificate of withdrawal or by revocation of its certificate of authority, the corporation remains, under the Act, subject to service of process in Illinois in only such cases as had their origin in Illinois during the period in which the corporation was licensed to do business there. This case obviously does not fall within that category. * * *"

In view of the decisions cited and quoted above, it is clear, beyond the possibility of rational dispute, that the decision of the Court of Appeals herein, far from being "in conflict with decisions of this Court" (Petition, p. 9), is in precise and exact accord with the principles set forth in *Simon* v. *Southern Ry. Co.*, 236 U. S. 115, 35 Sup. Ct. 255; *Chipman Ltd.* v. *Thomas B. Jeffrey Co.*, 251 U. S. 373, 40 Sup. Ct. 172; *Robert Mitchell Furniture Co.* v. *Selden Breck Construction Co.*, 257 U. S. 213, 42 Sup. Ct. 84; *Morris & Co.* v. *Skandinavia Insurance Co.*, 279 U. S. 405, 49 Sup. Ct. 360; *Hanson* v. *Denckla*, 357 U. S. 235, and a host of other decisions, both state and federal, far too numerous for extended comment.*

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* Some of the innumerable state and federal cases applying the rules of law set forth in the text, under statutes virtually identical with the Arizona Statute, are: *Hunter* v. *Mutual Reserve Life Insurance Co.*, 184 N. Y. 136, affirmed in 218 U. S. 573, 31 Sup. Ct. 127; *Hexter* v. *Day-Elder Motors Corp.*, 192 A.D. 394 [N. Y.]; *Livingston* v. *Southern Surety Co.*, 262 Mich. 438, 247 N. W. 712; *Haynes* v. *United Ins. Co.*, 48 Ohio App. 475, 194 N. E. 381; *Kelly* v. *Johnson Nut Co.*, 38 Fed. (2d) 177; *Reliance Motor Co.*

POINT III

The petitioner's argument that "the refusal to permit service of process pursuant to the Arizona statute in effect holds such statute unconstitutional" (Petition, p. 11) is unfounded.

By the express provisions of Ariz. Rev. Stat. §10-481(A)(2), the State of Arizona has limited the *in personam* jurisdiction of its courts over a foreign corporation which had withdrawn from its borders to causes of action which arose within the state. In this case, as well as in its earlier decision in *Arizona Barite Co.* v. *Western-Knapp Engineering Co.*, 170 Fed. (2d) 684, the Court of Appeals simply applied and enforced the statutory mandate.

In *Arizona Barite Co., supra,* it emphasized the fact that, "according to the complaint, the claim or cause of action sued on arose in Maricopa County (Arizona) out of business transacted by appellee in Maricopa County * * *" (p. 685). In *L. D. Reeder Contractors of Arizona* v. *Higgins Industries,* 265 Fed. (2d) 768 (9th Circ.), after a penetrating review of this Court's decisions in *McGee* v. *International Life Insurance Co.*, 335 U. S. 220 and *Hanson* v. *Denckla,* 357 U. S. 235, the Court of Appeals quashed the service of process and dismissed the complaint because (pp. 775 *et seq.*):

> "It is difficult to see how any facts showing defendant's activities within the forum state of

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v. *Craig,* 206 Iowa 804, 221 N. W. 499; *Confidential, Inc.* v. *Superior Court for Los Angeles,* 157 Cal. App. [2d] 75, 320 Pac. 2d 546; *Gerrick & Gerrick Co.* v. *Llewellyn Iron Works,* 105 Wash. 98, 177 Pac. 692; *Kirker-Bender Fire Escape Co.* v. *Chicago Beach Hotel,* 116 Fed. 359; *Mutual Reserve Fund Life Assoc.* v. *Boyer,* 62 Kan. 31, 61 Pac. 387.

California gave rise to any of the causes of action contained in the complaint."

In view of the foregoing decisions, and the authorities heretofore cited, the petitioner's contention that "the refusal to permit service of process pursuant to the Arizona statute in effect holds such statute unconstitutional" (Petition, p. 11) requires no further comment.

Conclusion

The vice of the petitioner's persistent attempts to drag the respondent across the country before the Arizona District Court, characterized by this Court in *Gulf Oil Corp.* v. *Gilbert,* 330 U. S. 501, 507, 67 Sup. Ct. 839, 842 (1947), as "a strategy of forcing the trial at a most inconvenient place for an adversary", is dramatically illustrated by what has occurred in the within case.

The only consideration which induced this respondent to settle and compromise the various suits and claims in which it was involved prior to October 3, 1963 was the enormous and imminently ruinous cost of being compelled to engage in extensive litigations in California, Arizona and other states many thousands of miles from its principal office (R., pp. 82-83). It sought to purchase its peace, permanently, and remove itself from the various forums in which it was incurring an economic burden which it could no longer bear by executing, in the State of New York, an agreement of settlement and compromise which terminated, for all time, any contact whatsoever with the State of Arizona. It sought, by these means, and by the contemplated expenditure of an enormous sum of

money, to dispose forever of matters for which it had denied any liability whatsoever, by defining and limiting its obligation, as well as the obligations of the other party to the controversies between them, to the duties and responsibilities created by the settlement agreement executed and delivered in New York. The alleged breach of that agreement by either Union or Dragor created litigable issues which possess no constitutional nexus whatsoever with any other jurisdiction but the State of New York.

The settlement which both parties are seeking to affirm, each charging the other with its breach, disposed forever of any possible contact with the State of Arizona which may have existed prior to the execution thereof. The petitioner is nevertheless endeavoring, as a litigating tactic, to subject Dragor to the intolerable pressures of a litigation in Arizona upon the very contract by which, for an inordinate price, it had sought to disassociate itself permanently from a state where continued litigation threatened it with financial ruin (R., p. 83).

The decision of the Court of Appeals neither abridges the substantive rights of the parties herein nor affects them adversely. The petitioner is free to procure an adjudication upon the merits of its claims, as suggested by the Court of Appeals, "by suing Dragor in Delaware, where it was incorporated, or in New York, where it has its principal place of business, and where this cause of action arose. Arizona has no interest in providing Union with a forum for such an action" (Opinion, p. 23).

It is respectfully submitted that the petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit be denied.

Respectfully submitted,

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